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 13 CORPORATION

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APR 24 2009

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KEVIN EMBRY, an individual, on behalf of
 himself, the general public and those similarly
 situated,

Plaintiff,

vs.

ACER AMERICA CORPORATION, a
 California corporation; and Does 1 through 50;

Defendants.

CASE NO. 01808 HRL

C09 NOTICE OF REMOVAL OF ACTION TO
 FEDERAL COURT

[Diversity Jurisdiction, 28 U.S.C. §§
 1332(d)(2), 1453, 1441, 1446]

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES, AND THEIR
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that defendant Acer America Corporation ("Acer") hereby
4 removes this action to the United States District Court for the Northern District of California, and
5 in support thereof, respectfully shows the Court as follows:

6

7 **STATEMENT OF THE CASE**

8 i. Plaintiff seeks to certify a nationwide class of Acer customers who purchased and
9 Acer computer "that was advertised or marketed by [Acer] to include a Microsoft Windows
10 operating system but did not include removable media (such as CD-rom or DVD-rom) with the
11 same functionality as the Windows operating system that could be separately purchased from
12 Microsoft." *See Compl.* ¶ 28.

13 ii. Plaintiff seeks, on behalf of himself and the purported class, compensatory
14 damages, restitution, statutory penalties, injunctive relief, and attorneys' fees and costs. *See Prayer*
15 *for Relief, Compl. at 17.*

16 iii. This action was filed on March 25, 2009, and is removable under the Class Action
17 Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d)(2) and 1453(b). Acer has satisfied all
18 procedural requirements of 28 U.S.C. § 1446 and thereby removes this action to the United States
19 District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1332, 1441, 1446
20 and 1453.

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JURISDICTION

23 iv. This court holds diversity jurisdiction over this action, according to 28 U.S.C. §
24 1332 (d)(2).

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1 **THE REQUIREMENTS FOR REMOVAL UNDER CAFA ARE SATISFIED**

2 iv. CAFA fundamentally changed the legal standards governing removal jurisdiction.
 3 Believing that state courts were not adequately protecting defendants against class action abuses,
 4 Congress explicitly stated that CAFA's "provisions should be read broadly, with a strong
 5 preference that interstate actions should be heard in a federal court." S. Rep. No. 109-14, at *43
 6 (2005). Rather than emphasize a strict construction of the statute against removal jurisdiction,
 7 Congress instructs district courts to "err in favor of exercising jurisdiction." *Id.* at 42-43. As
 8 shown below, the requirements for diversity jurisdiction under CAFA, 28 U.S.C. § 1332(d)(2), are
 9 satisfied.

10 v. *Class Action.* This lawsuit is a class action as defined by 28 U.S.C.
 11 § 1332(d)(1)(B). CAFA defines a "class action" as "any civil action filed under rule 23 of the
 12 Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing
 13 an action to be brought by 1 or more representative persons as a class action." *Id.* Plaintiff styles
 14 his complaint a "Class Action" and alleges that he brings it "on behalf of himself and all others
 15 similarly situated." Compl. ¶ 28.

16 vi. *Diversity of Citizenship.* At the time this lawsuit was filed and as of the date of
 17 this notice, Acer was and is a California corporation with its principal place of business in San
 18 Jose. *See* Compl. ¶ 3. At the time of the filing of this action and as of the date of this notice, the
 19 named plaintiff, Kevin Embry, was and is a resident and citizen of Illinois. *See id.* ¶ 2. Because at
 20 least one member of the proposed class is from a state other than California, the diversity
 21 requirement of 28 U.S.C. § 1332(d)(2)(A) is satisfied.

22 Acer's alleged California citizenship does not affect its right to remove this action. 28
 23 U.S.C. § 1453(b) ("A class action may be removed to a district court of the United States in
 24 accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State
 25 in which the action is brought.")

26 vii. *Amount in Controversy.* Defendant believes that the matter in controversy exceeds
 27 the sum or value of \$5,000,000, exclusive of interest and costs, satisfying the amount in
 28

1 controversy requirement of 28 U.S.C. § 1332(d)(2). Plaintiff's request includes a class action
 2 demand for the following:

- 3 (1) Restitution damages under California Business & Professions Code §§
 4 17200, et seq. and 17500, et seq.;
- 5 (2) Compensatory and punitive damages;
- 6 (3) Injunctive relief;
- 7 (4) Costs; and
- 8 (5) Attorneys' fees.

9 See Prayer for Relief, Compl. at 17. Aggregation of these potential damages and expenses brings
 10 this matter within the purview of CAFA.

11 Under CAFA, the amount in controversy is determined by aggregating the claims of all
 12 individual class members. 28 U.S.C. § 1332(d)(6). A court must "assume that the allegations of
 13 the complaint are true and assume that a jury will return a verdict for the plaintiff on all claims
 14 made in the complaint." *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F.Supp.2d
 15 993, 1001 (C.D. Cal. 2002) (quotations omitted); see also *Theis Research, Inc. v. Brown & Bain*,
 16 400 F.3d 659, 664 (9th Cir. 2005) ("The question is not whether [the defendant] was successful in
 17 its . . . defense. The question is whether the amount of damages [the plaintiff] claimed in its
 18 complaint was asserted in good faith; if so, that amount controls for purposes of diversity
 19 jurisdiction."). Thus, it is irrelevant to assessing the amount in controversy that Acer denies
 20 liability and denies that plaintiffs are entitled to the type and amount of relief requested. Rather,
 21 the Court should consider that plaintiff may try to seek as damages a refund of the purchase price
 22 of the numerous computers at issue, in addition to other monetary claims. Acer has sold more
 23 than ten thousand of the computers at issue, which easily satisfies the jurisdictional requirement.

24 Further, where, as here, the complaint does not state the amount in controversy, the Court
 25 should conduct an independent common sense review of that jurisdictional issue. *Fiore v. First*
 26 *American Title Ins. Co.*, 2005 WL 3434074, *3 (S.D.Ill. 2005) (denying motion to remand in a
 27 case removed under CAFA based on a "common sense" reading of a complaint brought on behalf
 28 of a large class with potentially significant claims, and rejecting as "wishful thinking" plaintiff's

1 claims that the complaint seeks less than the jurisdictional amount); *see also Bosing v. Philips*
 2 *Plastics Corp.*, 57 F.Supp.2d 986, 988 (S.D.Cal. 1999) (where the complaint does not state the
 3 amount in dispute, the court may perform an independent analysis of the allegations upon a
 4 motion to remand); *Lininger v. State Farm Fire & Cas.*, 958 F. Supp. 519 (D.Kan. 1997) (finding
 5 federal jurisdiction based upon an independent examination of the complaint, and rejecting
 6 plaintiff's stipulation that he sought less than \$50,000).

7 Moreover, the costs of injunctive relief sought by plaintiff also contribute to the
 8 amount in controversy substantially. In determining the value of the requested injunctive relief
 9 under CAFA, the Court may consider the defendant's cost of compliance. S. Rep. No. 109-14, at *
 10 41 (because CAFA permits aggregation of damages, the cases valuing injunction solely from the
 11 perspective of its benefit to the class are no longer relevant). *See also* 15 JAMES WM. MOORE ET
 12 AL., MOORE'S FEDERAL PRACTICE § 102.109 [6][b]; Sarah S. Vance, *A Primer On the Class*
 13 *Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1629 (2006) ("the proper approach to valuing
 14 claims for injunctive relief under CAFA seems to be to use the total benefit to the plaintiff class or
 15 the aggregate cost to the defendant." (emphasis added)). Although plaintiff does not specify the
 16 injunctive relief he seeks, it appears that he is demanding that Acer include with its computers
 17 back-up disks that it sells for \$25.00. Considering the volume of computers at issue, the requested
 18 injunctive relief would be quite costly.

19 Finally, plaintiff's demand for punitive damages and attorneys' fees supports a finding that
 20 the jurisdictional threshold of the amount in controversy is satisfied. Punitive damages are part of
 21 the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001).
 22 Attorneys' fees, if authorized by statute or contract, are also part of the calculation. *Kroske v. U.S.*
 23 *Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005). The litigation of this nationwide class action is
 24 likely to be lengthy and complex.

25 viii. *Number of Proposed Class Members.* As Plaintiff admits in his Complaint, the
 26 proposed nationwide Class is comprised of "more than 500 persons." Compl. ¶ 30. Accordingly,
 27 the action satisfies the requirement of 28 U.S.C. § 1332(d)(5) that the proposed class include at
 28 least 100 persons.

1 ix. *Timeliness.* This removal notice is timely filed as required by 28 U.S.C. § 1446(b).
2 Acer was served with the Complaint on March 26, 2009 and files this notice within thirty days
3 after receipt of the Complaint.

4 x. *Exceptions Do Not Apply.* The exceptions to removal under 28 U.S.C. §§ 1332(d)
5 and 1446 do not apply.
6

7 THE OTHER PROCEDURAL REQUISITES FOR REMOVAL ARE SATISFIED

8 xi. Acer has complied with 28 U.S.C. §§ 1446(a) & (d). Under 28 U.S.C. § 1446(a), a
9 true and correct copy of all of the process, pleadings, or orders on file in the state court or served
10 on Acer in the state court are attached as Exhibit 1. Pursuant to 28 U.S.C. § 1446(d), a notice of
11 filing of removal, with a copy of this notice of removal attached thereto, has been filed with the
12 clerk of the Superior Court of the State of California, County of Santa Clara, Case No. 109-CV-
13 138187, and Acer has served a notice of filing of removal, with a copy of the notice of removal
14 attached thereto, on plaintiff's attorneys. Copies of the notice and the certificate of service of the
15 notice to plaintiff and the Superior Court of the State of California, County of Santa Clara, are
16 attached as Exhibit 2. (Exhibit A to Exhibit 2, which is a copy of this notice, is not attached for
17 the Court's convenience. Defendant will provide it upon request.)
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1 CONCLUSION

2 By this notice, Acer does not waive any objections it may have as to improper service,
3 jurisdiction, or venue, or any other defenses or objections to this action. Acer intends no
4 admission of fact, law, or liability by this notice, and reserves all defenses, motions, and pleas.
5 Acer prays that this action be removed to this Court for determination; that all further proceedings
6 in the state court suit be stayed; and that Acer obtain all additional relief to which it is entitled.

7

8 DATED: April 23, 2009

QUINN EMANUEL URQUHART OLIVER &
9 HEDGES, LLP

10 By

Jeffery D. McFarland
11 Attorneys for defendant ACER AMERICA
12 CORPORATION

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EXHIBIT 1

1 GUTRIDE SAFIER LLP
2 ADAM J. GUTRIDE (State Bar No. 181446)
3 SETH A. SAFIER (State Bar No. 197427)
4 835 Douglass Street
5 San Francisco, California 94114
6 Telephone: (415) 336-6545
7 Facsimile: (415) 449-6469

8 Attorneys for Plaintiff

ENDORSED

809 MAR 25 P 2:01

DEPUTY CLERK OF THE SUPERIOR COURT
COUNTY OF SANTA CLARA

BY _____

A. M. [Signature]

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SANTA CLARA

9 109CV138187

10 KEVIN EMBRY, an individual, on behalf of himself, the
11 general public and those similarly situated

CASE NO.

12 Plaintiff,

UNLIMITED CIVIL CASE

13 v.

14 ACER AMERICA CORPORATION; AND DOES 1
15 THROUGH 50
16 Defendants
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CLASS ACTION COMPLAINT
FOR FALSE ADVERTISING;
VIOLATION OF THE CALI-
FORNIA CONSUMERS LE-
GAL REMEDIES ACT;
FRAUD, DECEIT AND/OR
MISREPRESENTATION; AND
UNFAIR BUSINESS PRAC-
TICES

JURY TRIAL DEMANDED

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FAXED

1 Kevin Embry, by and through his counsel, brings this Class Action Complaint against
2 Defendants, on behalf of himself and those similarly situated, for violations of sections 17200 and
3 17500 *et seq.* of the California Business and Professions Code; violation of the California
4 Consumers Legal Remedies Act; and fraud, deceit and/or misrepresentation. The following
5 allegations are based upon information and belief, including the investigation of Plaintiff's
6 counsel, unless stated otherwise.

7 **INTRODUCTION**

8 1. Defendants unfairly, unlawfully and deceptively market and advertise personal
9 computers as including genuine Microsoft Windows Vista or Windows XP operating systems. In
10 fact, Defendants only provide to their customers a subset of the Windows Vista or XP
11 functionality. Moreover, Defendants do not include with their computers any removable media
12 (such as CD-roms or DVD-roms), so if the operating system fails, consumers have no way to
13 troubleshoot the system or restore it. Defendants instead charge customers an additional
14 approximately \$25, to obtain CD-roms with copies of the preinstalled software, but these CD-
15 roms also do not have the full functionality of the Microsoft Windows operating systems.

16 **PARTIES**

17 2. Kevin Embry ("Plaintiff") is, and at all times alleged in this Class Action
18 Complaint was, an individual and a resident of the City of Bloomington, Illinois.

19 3. Defendant Acer America Corporation is a corporation incorporated under the laws
20 of the state of California, having its principal place of business in San Jose, California.

21 4. The true names and capacities of Defendants sued as Does 1 through 50 inclusive
22 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to
23 section 474 of the California Code of Civil Procedure. Plaintiff will seek leave of Court to amend
24 this Class Action Complaint when said true names and capacities have been ascertained.

25 5. The Parties identified in paragraphs 3 through 4 of this Class Action Complaint are
26 collectively referred to hereafter as "Defendants" or "Acer."

27 6. At all times herein mentioned, each of the Defendants was the agent, servant,
28 representative, officer, director, partner or employee of the other Defendants and, in doing the

I things herein alleged, was acting within the scope and course of his/her/its authority as such agent, servant, representative, officer, director, partner or employee, and with the permission and consent of each Defendant.

4 7. At all times herein mentioned, Defendants, and each of them, were members of,
5 and engaged in, a joint venture, partnership and common enterprise, and acting within the course
6 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

7 8. At all times herein mentioned, the acts and omissions of Defendants, and each of
8 them, concurred and contributed to the various acts and omissions of each and all of the other
9 Defendants in proximately causing the injuries and damages as herein alleged.

10 9. At all times herein mentioned, Defendants, and each of them, ratified each and
11 every act or omission complained of herein. At all times herein mentioned, the Defendants, and
12 each of them, aided and abetted the acts and omissions of each and all of the other Defendants in
13 proximately causing the damages, and other injuries, as herein alleged.

JURISDICTION AND VENUE

15 10. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business
16 and Professions Code, section 17200, *et seq.* Plaintiff and Defendants are “persons” within the
17 meaning of the California Business and Professions Code, section 17201.

18 11. The injuries, damages and/or harm upon which this action is based, occurred or
19 arose out of activities engaged in by Defendants within, affecting, and emanating from, the State
20 of California.

21 12. Defendants have engaged, and continue to engage, in substantial and continuous
22 business practices in the State of California, including in the City of San Jose and County of
23 Santa Clara.

13. Accordingly, Plaintiff alleges that jurisdiction and venue are proper in this Court.

SUBSTANTIVE ALLEGATIONS

Defendants Market, Advertise and Sell Nationwide Computers

27 14. Acer is one of the world's five biggest vendors of personal computers ("PCs").

28 15. In each of the PCs that Defendants sell, they market and advertise that the PC

1 includes a particular "Genuine Windows" operating system. For example, Acer markets and
2 advertises, without limitation, that their computers include the following:

3 Genuine Windows Vista® Home Premium.

4 The Windows Genuine Advantage

5 About genuine Windows®:

6 Genuine Windows software is published by Microsoft and is supported by Microsoft or an
7 authorized licensor. Genuine Microsoft® Software gives you access to all the latest
8 updates and helps keep your computer performing at its best by helping protect you from
9 the risks and problems of counterfeit software.

10 Acer supports genuine Microsoft software. Microsoft products are licensed by Acer and
11 accompanied by a Microsoft Certificate of Authenticity (COA) affixed to your computer.
12 You can find out if you're running Genuine Windows by clicking Validate Windows on
13 www.microsoft.com/genuine. Microsoft values your privacy and does not use any
14 information collected during the validation process to contact or identify you. Read the
15 Windows Genuine Advantage Privacy Statement.

16 But Defendants do not provide to their customers the represented Windows operating system.

17 Rather, Defendants deceptively provide to their customers an installed, OEM version of the
18 Windows operating system with less functionality than the genuine Windows system, including
19 missing parts of the startup repair and system recovery functionality.

20 16. With respect to certain other software that is preinstalled on their PCs, when
21 Defendants advertise that such software is preinstalled, they place an asterisk on marketing
22 materials to denote that the software is "OEM, not full-featured, version." Defendants do not
23 include such an asterisk with regard to the Windows software. The omission of this asterisk adds
24 to the deception.

25 17. Moreover, Defendants do not include with their PCs any removable media—i.e.,
26 CDs or DVDs—containing the Windows operating system or other software. Other PC
27 manufacturers, by contrast, regularly include such media, and reasonable consumers expect such
28 media to be included in the box with a new PC. Instead of including the media, Defendants
charge customers an additional approximately \$25 plus shipping if they wish to receive copies of
the "System Disk" and "Recovery Disks." In their marketing materials and packaging for the
PCs, however, Defendants do not disclose the absence of the media or the additional cost required
to purchase it.

1 18. When customers do purchase the "System Disk" and "Recovery Disks,"
2 Defendants provide disks that again lack the full functionality of the Windows operating system,
3 including many of Windows' troubleshooting and restoration features and utilities, including
4 without limitation the "memtest" and "bootfix" utilities. But Defendants do not disclose the
5 limited functionality of the System Disk and Recovery Disks prior to charging customers the
6 additional fee for purchase of those disks.

7 19. Defendants are aware that the missing disks, options and utilities are required to
8 diagnose, reboot and/or restore customers' PCs when they malfunction.

9 20. Defendants engage in these deceptive acts to increase their revenues.

10 Defendants Intentionally Omitted To Inform Plaintiff That He Was Not Purchasing A
11 "Full-Featured" Version Of His Windows Operating System Software, Including A Version
12 Of His Windows Operating System Software On CD Or DVD,

13 21. On or about February 16, 2008, Plaintiff purchased from Walmart an Acer Aspire
14 5920 notebook computer for approximately \$698.00. Plaintiff made the purchase after seeing that
15 the computer was advertised and marketed as including the genuine Windows Vista® operating
system.

16 22. On their website, Defendants further marketed and advertised the Aspire
17 computers as including certain additional software such as, without limitation, anti-virus software
18 and CD maker software. Unlike the genuine Windows Vista® operating system software, the
19 antitrust virus and CD marker software representations were followed by an asterisk and a
20 disclaimer. Specifically, they state "Anti-virus software (trial version)*" and "NTI CD-Maker™
21 Gold*." Defendants' marketing and advertising materials further explained that this software was
22 "*OEM, not full-featured, version."

23 23. Based on Plaintiff's prior experience with PCs purchased at retail, Plaintiff had
24 expected at the time of purchase that the computer would include a CD or DVD containing the
25 operating system and other software. Defendants, however, intentionally, unlawfully and
26 deceptively failed to inform Plaintiff that he would not receive a DVD or CD for his Windows
27 Vista® software and/or that the Windows Vista® software was incomplete. Moreover, unlike the
28 included anti-virus and CD-maker software, Defendants intentionally failed to inform Plaintiff,

1 and those similarly situated, that the include Microsoft operating system software was an "OEM"
 2 and not a "full-featured version."

3 24. On or around February 18, 2008, the computer would not boot. Plaintiff wanted to
 4 run diagnostics on his computer that he knew to be included with the Windows operating system,
 5 but because there were no disks included with the computer, there was nothing he could do.

6 25. Plaintiff called Acer on around February 18, 2008 to explain that he wanted to run
 7 certain diagnostic tools that should have been resident on an included Windows Vista CD or
 8 DVD. Defendants informed Plaintiff that they could not send the official Windows Vista DVD or
 9 CD to him, and if he wanted that CD he would have to purchase a new retail copy of Windows
 10 Vista from Microsoft or a local retailer. Defendants alternatively suggested that Plaintiff could
 11 buy from them several recovery CDs. Plaintiff purchased the recovery CDs from Defendants and
 12 paid via money order approximately \$25.00, including shipping and handling.

13 26. While waiting for the CDs to arrive, Plaintiff returned the computer to Walmart to
 14 be exchanged for another one of the identical type and price on or about February 23, 2008.
 15 Walmart did not charge any money for the exchange.

16 27. In late February and March 2009, Plaintiff started experiencing trouble with his
 17 computer. Plaintiff attempted to diagnose and repair the problems, including by defragmenting
 18 his hard drive. After the attempt at defragmentation, the computer crashed and would not reboot.
 19 As Plaintiff did not have the Windows Vista start up disk, he could not repair or diagnose the
 20 problem(s). Although Plaintiff had received three CDs from Acer in exchange for the \$25 he
 21 paid—one called "System Disk" and two called "Recovery Disk"—Plaintiff could not use those
 22 CDs to troubleshoot or fix the problems with his PC, because the disks do not include the
 23 troubleshooting and restoration applications that are part of Microsoft Vista. Rather, unlike a
 24 genuine Windows program, the CDs merely permitted Plaintiff to reinstall the factory-installed
 25 version of Windows and erase all applications he had subsequently installed. Plaintiff also tried
 26 to use his own CD on which he had burned a copy of the Windows software that had been
 27 preinstalled on his hard drive, but that was also ineffective, presumably because the OEM version
 28 of Windows Vista that had been preinstalled by Acer did not contain all features of Windows

1 Vista. Plaintiff tried to obtain a copy of Windows Vista directly from Microsoft but was told that
2 Microsoft could not provide it and that he would have to contact Acer.

3 **CLASS ALLEGATIONS**

4 28. Plaintiff brings this action against Defendants on behalf of himself and all others
5 similarly situated, as a class action pursuant to section 382 of the California Code of Civil
6 Procedure and section 1781 of the California Civil Code. Plaintiff seeks to represent a group of
7 similarly situated persons. The group is defined as follows:

8 All persons who, from March 24, 2005 through the present, purchased in the
9 United States a PC manufactured by Defendants that was advertised or mar-
10 keted by Defendants to include a Microsoft Windows operating system but
11 did not include removable media (such as a CD-rom or DVD-rom) with the
same functionality as the Windows operating system that could be separately
purchased from Microsoft.

12 29. This action has been brought and may properly be maintained as a class action
13 against the Defendants pursuant to the provisions of California Code of Civil Procedure section
14 382 because there is a well-defined community of interest in the litigation and the proposed class
15 is easily ascertainable.

16 30. Numerosity: Plaintiff does not know the exact size of the class, but it is estimated
17 that it is composed of more than 500 persons. The persons in the class are so numerous that the
18 joinder of all such persons is impracticable and the disposition of their claims in a class action
19 rather than in individual actions will benefit the parties and the courts.

20 31. Common Questions Predominate: This action involves common questions of law
21 and fact to the potential class because each Class Member's claim derives from the deceptive,
22 unlawful and/or unfair statements and omissions that led customers to believe that they would be
23 (but were not) provided with a complete version of the Windows operating system, including the
24 utilities and/or CD(s) or DVD(s) necessary to repair, restore and/or diagnosis their computers.
25 The common questions of law and fact predominate over individual questions, as proof of a
26 common or single set of facts will establish the right of each member of the Class to recover.
27 Among the questions of law and fact common to the class are:

28 a) Whether Defendants unfairly, unlawfully and/or deceptively failed to

1 inform consumers that they were purchasing an incomplete Windows operating system—i.e., a
2 operating system that did not include the necessary Windows operating system disks and utilities
3 necessary to reboot, restore, or diagnose problems with their computers;

4 b) Whether Defendants unfairly, unlawfully and/or deceptively failed to
5 inform class members that they were purchasing a Windows operating system that was OEM, and
6 not a full-featured version;

7 c) Whether Defendants' advertising and marketing regarding the computers
8 that they sold was likely to deceive Class Members or was unfair;

9 d) Whether Defendants engaged in the alleged conduct knowingly, recklessly,
10 or negligently;

11 e) The amount of revenues and profits Defendants received and/or the amount
12 of monies or other obligations lost by Class Members as a result of such wrongdoing;

13 f) Whether Class Members are entitled to injunctive and other equitable relief
14 and, if so, what is the nature of such relief; and

15 g) Whether Class Members are entitled to payment of actual, incidental,
16 consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the
17 nature of such relief.

18 32. Typicality: Plaintiff's claims are typical of the class because Plaintiff purchased a
19 PC from Defendants that included a Windows operating system that was incomplete and/or not as
20 represented. Thus, Plaintiff and Class Members sustained the same injuries and damages arising
21 out of Defendants' conduct in violation of the law. The injuries and damages of each Class
22 Member were caused directly by Defendants' wrongful conduct in violation of law as alleged.

23 33. Adequacy: Plaintiff will fairly and adequately protect the interests of all Class
24 Members because it is in his best interests to prosecute the claims alleged herein to obtain full
25 compensation due to him for the unfair and illegal conduct of which he complains. Plaintiff also
26 has no interests that are in conflict with or antagonistic to the interests of Class Members.
27 Plaintiff has retained highly competent and experienced class action attorneys to represent his
28 interests and that of the class. No conflict of interest exists between Plaintiff and Class Members

1 hereby, because all questions of law and fact regarding liability of Defendants are common to
2 Class Members and predominate over any individual issues that may exist, such that by prevailing
3 on his own claim, Plaintiff necessarily will establish Defendants' liability to all Class Members.
4 Plaintiff and his counsel have the necessary financial resources to adequately and vigorously
5 litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to
6 the Class Members and are determined to diligently discharge those duties by vigorously seeking
7 the maximum possible recovery for Class Members.

8 34. Superiority: There is no plain, speedy, or adequate remedy other than by
9 maintenance of this class action. The prosecution of individual remedies by members of the class
10 will tend to establish inconsistent standards of conduct for the Defendants and result in the
11 impairment of Class Members' rights and the disposition of their interests through actions to
12 which they were not parties. Class action treatment will permit a large number of similarly
13 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,
14 and without the unnecessary duplication of effort and expense that numerous individual actions
15 would engender. Furthermore, as the damages suffered by each individual member of the class
16 may be relatively small, the expenses and burden of individual litigation would make it difficult
17 or impossible for individual members of the class to redress the wrongs done to them, while an
18 important public interest will be served by addressing the matter as a class action.

19 35. Nexus to California. The State of California has a special interest in regulating the
20 affairs of corporations that do business here. Defendants have their principal place of business in
21 California, and the acts complained of herein emanated from decisions made by Defendants in
22 California. Accordingly, there is a substantial nexus between Defendants' unlawful behavior and
23 California such that the California courts should take cognizance of this action on behalf of a
24 class of individuals who reside anywhere in the United States.

25 36. Plaintiff is unaware of any difficulties that are likely to be encountered in the
26 management of this action that would preclude its maintenance as a class action.

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28

CAUSES OF ACTION

PLAINTIFF'S FIRST CAUSE OF ACTION

(False Advertising, Business and Professions Code § 17500, et seq. ("FAL"))
On Behalf Of Himself and the Class

37. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

38. Beginning at an exact date unknown to Plaintiff, but within three (3) years preceding the filing of the Class Action Complaint, Defendants have made untrue, false, deceptive and/or misleading statements in connection with the advertising and marketing of their PCs throughout the United States.

10 39. Defendants have made representations and statements (by omission and
11 commission) that lead reasonable customers to believe that they will be provided with a complete
12 Windows operating system, including all of the system utilities and CDs or DVDs necessary to
13 reboot, restore and/or diagnose their computers. Defendants, however, deceptively omit to
14 inform customers that (1) they are receiving an OEM version of the Windows operating system,
15 (2) their Windows operating system is not full-featured, (3) the packaging does not contain the
16 Windows operating system software CDs, DVDs or utilities necessary to reboot, restore and/or
17 diagnose their computers, (4) an additional approximately \$25 must be paid to obtain copies of
18 the System Disk and the Recovery Disks, and (5) the System Disk and the Recovery Disks do not
19 contain the full features of the advertised Windows operating system.

20 40. Plaintiff and those similarly situated relied to their detriment on Defendants' false,
21 misleading and deceptive advertising and marketing practices. Had Plaintiff and those similarly
22 situated been adequately informed and not intentionally deceived by Defendants, they would have
23 acted differently by, without limitation, purchasing different computers, software or different
24 warranties.

41. Defendants' acts and omissions are likely to deceive the general public.

26 42. Defendants engaged in these false, misleading and deceptive advertising and
27 marketing practices to increase their profits. Accordingly, Defendants have engaged in false
28 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and

1 Professions Code.

2 43. The aforementioned practices, which Defendants have used, and continue to use,
3 to their significant financial gain, also constitute unlawful competition and provide an unlawful
4 advantage over Defendants' competitors as well as injury to the general public.

5 44. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
6 necessary and according to proof, to restore any and all monies acquired by Defendants from
7 Plaintiff, the general public, or those similarly situated by means of the false, misleading and
8 deceptive advertising and marketing practices complained of herein, plus interest thereon.

9 45. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
10 Defendants from continuing to engage in the false, misleading and deceptive advertising and
11 marketing practices complained of herein. The acts complained of herein occurred, at least in
12 part, within three (3) years preceding the filing of this Class Action Complaint.

13 46. Plaintiff and those similarly situated are further entitled to and do seek both a
14 declaration that the above-described practices constitute false, misleading and deceptive
15 advertising, and injunctive relief restraining Defendants from engaging in any such advertising
16 and marketing practices in the future. Such misconduct by Defendants, unless and until enjoined
17 and restrained by order of this Court, will continue to cause injury in fact to the general public
18 and the loss of money and property in that the Defendants will continue to violate the laws of
19 California, unless specifically ordered to comply with the same. This expectation of future
20 violations will require current and future customers to repeatedly and continuously seek legal
21 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
22 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
23 remedy at law to ensure future compliance with the California Business and Professions Code
24 alleged to have been violated herein.

25 47. As a direct and proximate result of such actions, Plaintiff and the other members of
26 the Class have suffered, and continue to suffer, injury in fact and have lost money and/or property
27 as a result of such false, deceptive and misleading advertising in an amount which will be proven
28 at trial, but which is in excess of the jurisdictional minimum of this Court.

1 48. As a direct and proximate result of such actions, Defendants have enjoyed, and
2 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
3 is in excess of the jurisdictional minimum of this Court.

PLAINTIFF'S SECOND CAUSE OF ACTION

(Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, et seq.)
On Behalf of Himself and the Class

6 49. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint
7 as if set forth herein.

8 50. This cause of action is brought pursuant to the California Consumers Legal
9 Remedies Act, California Civil Code § 1750, *et seq.* ("CLRA").

51. Defendants' actions, representations and conduct have violated, and continue to
52. violate the CLRA, because they extend to transactions that are intended to result, or which have
53. resulted, in the sale or lease of goods or services to consumers.

13 52. Plaintiff and other Class Members are "consumers" as that term is defined by the
14 CLRA in California Civil Code § 1761(d).

15 53. The PCs that Plaintiff (and others similarly situated Class Members) purchased
16 from Defendants were “goods” within the meaning of California Civil Code § 1761.

17 54. The Recovery Disks and System Disks that Plaintiff (and others similarly situated
18 Class Members) purchased from Defendants were "goods" within the meaning of California Civil
19 Code § 1761.

20 55. By engaging in the actions, representations and conduct set forth in this Class
21 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(2), § 1770(a)(3),
22 § 1770(a)(5), § 1770(a)(7), and § 1770(a)(9) of the CLRA. In violation of California Civil Code
23 §1770(a)(2), Defendants' acts and practices constitute misrepresentations of the source,
24 sponsorship, approval, or certification of goods or services. In violation of California Civil Code
25 §1770(a)(2), Defendants' acts and practices constitute misrepresentations of the affiliation,
26 connection, or association with, or certification by, another. In violation of California Civil Code
27 §1770(a)(5), Defendants' acts and practices constitute improper representations that the goods or
28 services that they sell have sponsorship, approval, characteristics, ingredients, uses, benefits, or

1 quantities, which they do not have. In violation of California Civil Code §1770(a)(7),
2 Defendants' acts and practices constitute improper representations that the goods or services that
3 they sell are of a particular standard, quality, or grade, or that goods are of a particular style or
4 model, when they were not. In violation of California Civil Code §1770(a)(9), Defendants
5 advertise goods or services with intent not to sell them as advertised.

6 56. Specifically, Defendants acts and practices lead customers to believe that they will
7 be provided with a complete and genuine Microsoft Windows operating system, as certified by
8 Microsoft, including all of the system utilities and CDs or DVDs necessary to reboot, restore
9 and/or diagnose their computers that are elements of official Microsoft Windows operating
10 system. To the contrary, Defendants sold to consumer PCs with a limited, OEM version of the
11 Windows operating system that did not include the CDs, DVDs or utilities necessary to reboot,
12 restore and/or diagnose their computers. Further, the CDs that are subsequently provided at an
13 additional charge do not include the full features of the Windows operating system.

14 57. Plaintiff requests that this Court enjoin Defendants from continuing to employ the
15 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
16 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
17 future, Plaintiff and the other members of the Class will continue to suffer harm.

18 58. CLRA § 1782 NOTICE. Irrespective of any representations to the contrary in
19 this Class Action Complaint, Plaintiff specifically disclaims, at this time, any request for
20 damages under any provision of the CLRA. Plaintiff, however, hereby provides Defendants
21 with notice and demand that within thirty (30) days from that date, Defendants correct, repair,
22 replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices complained of
23 herein. Defendants' failure to do so will result in Plaintiff amending this Class Action Complaint
24 to seek, pursuant to California Civil Code § 1780(a)(3), on behalf of himself and those similarly
25 situated Class Members, compensatory damages, punitive damages and restitution of any ill-
26 gotten gains due to Defendants' acts and practices.

27 59. Plaintiff also requests that this Court award him his costs and reasonable attorneys'
28 fees pursuant to California Civil Code § 1780(d).

PLAINTIFF'S THIRD CAUSE OF ACTION

(Fraud, Deceit and/or Misrepresentation)
On Behalf of Himself and The Class

60. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

5 61. On or about February 16, 2008, Defendants fraudulently and deceptively failed to
6 inform Plaintiff that the PC he was purchasing did not include a complete Windows operating
7 system, including all of the system utilities and CDs or DVDs necessary to reboot, restore and/or
8 diagnose their computers. Defendants also fraudulently and deceptively failed to inform him that
9 the PC he was purchasing, in fact, only included an OEM version of the Windows operating
10 system, that the Windows operating system on his PC was not, in fact, "Genuine," and that the
11 included Windows operating system did not include the CDs, DVDs or utilities necessary to
12 reboot, restore and/or diagnose his computer.

13 62. These omissions were material at the time they were made. They concerned
14 material facts that were essential to the analysis undertaken by Plaintiff as to whether to purchase
15 his computer.

16 63. In not so informing Plaintiff, Defendants breached their duty to him. Defendants
17 also gained financially from, and as a result of, their breach.

18 64. Plaintiff and those similarly situated relied to their detriment on Defendants' 19 fraudulent omissions. Had Plaintiff and those similarly situated been adequately informed and 20 not intentionally deceived by Defendants, they would have acted differently by, without 21 limitation, purchasing different computers, software or additional warranties.

22 65. Defendants had a fiduciary duty to inform Class Members at the time of their
23 purchase of their computer, of the true nature of the Microsoft operating software that they were
24 purchasing. Defendants omitted to provide this information to Class Members. Class Members
25 relied to their detriment on Defendants' omissions. These omissions were material to the
26 decisions of the Class Members to purchase their computers. In making these omissions,
27 Defendants breached their duty to Class Members. Defendants also gained financially from, and
28 as a result of, their breach.

1 66. Defendants had a fiduciary duty to inform Class Members at the time of their
2 purchase of their computers of the true nature of the Microsoft operating systems that was
3 includes with the PCs that they were purchasing. Defendants omitted to provide this information
4 to Class Members. Class Members relied to their detriment on Defendants' omissions. These
5 omissions were material to the decisions of the Class Members to purchase their computers. In
6 making these omissions, Defendants breached their duty to Class Members. Defendants also
7 gained financially from, and as a result of, their breach.

8 67. By and through such fraud, deceit, misrepresentations and/or omissions,
9 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their
10 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiff and those
11 similarly situated to, without limitation, to purchase certain PCs.

12 68. Plaintiff and those similarly situated justifiably and reasonably relied on
13 Defendants' omissions, and, accordingly, were damaged by the Defendants.

14 69. As a direct and proximate result of Defendants' misrepresentations, Plaintiff and
15 those similarly situated have suffered damages, including, without limitation, the amount they
16 paid for their PCs, for System Disks and Recovery Disks, and/or for new retail copies of
17 Windows.

18 70. Defendants' conduct as described herein was willful and malicious and was
19 designed to maximize Defendants' profits even though Defendants knew that it would cause loss
20 and harm to Plaintiff and those similarly situated.

PLAINTIFF'S FOURTH CAUSE OF ACTION
(Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200, et seq.)
On Behalf of Himself and the Class

24 71. Plaintiff realleges and incorporates by reference the paragraphs of this Class
25 Action Complaint as if set forth herein.

26 72. Within four (4) years preceding the filing of this Class Action Complaint, and at
27 all times mentioned herein, Defendants have engaged, and continue to engage, in unfair, unlawful
28 and deceptive trade practices in California by engaging in the unfair, deceptive and unlawful

1 business practices outlined in this Class Action Complaint. In particular, Defendants have
2 engaged, and continue to engage, in unfair, unlawful and deceptive trade practices by without
3 limitation the following:

- 4 a. failing to inform Plaintiff, and those similarly situated, that they were purchasing a
5 PC with an OEM version of the Windows operating system;
- 6 b. failing to inform Plaintiff, and those similarly situated, that they were purchasing a
7 PC with a Windows operating system that did not include all of the system utilities
8 and CDs or DVDs necessary to reboot, restore and/or diagnose their computers;
- 9 c. falsely and deceptively informing Plaintiff, and those similarly situated, that they
10 were purchasing a PC with a "Genuine" Windows operating system;
- 11 d. affirmatively deceiving their customers into believing that they were purchasing a
12 complete or standard version of the Windows operating system;
- 13 e. violating the CLRA; and
- 14 f. violating the FAL.

15 73. Plaintiff and those similarly situated relied to their detriment on Defendants'
16 unfair, deceptive and unlawful business practices. Had Plaintiff and those similarly situated been
17 adequately informed and not intentionally deceived by Defendants, they would have acted
18 differently by, without limitation, purchasing different computers, software or different
19 warranties.

20 74. Defendants' acts and omissions are likely to deceive the general public.

21 75. Defendants engage in these unfair practices to increase their profits. Accordingly,
22 Defendants have engaged in unlawful trade practices, as defined and prohibited by section 17200,
23 et seq. of the California Business and Professions Code.

24 76. The aforementioned practices, which Defendants have used, and continue to use,
25 to their significant financial gain, also constitute unlawful competition and provide an unlawful
26 advantage over Defendants' competitors as well as injury to the general public.

27 77. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
28 necessary and according to proof, to restore any and all monies acquired by Defendants from

1 Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive
2 trade practices complained of herein, plus interest thereon.

3 78. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
4 Defendants from continuing to engage in the unfair trade practices complained of herein. The
5 acts complained of herein occurred, at least in part, within four (4) years preceding the filing of
6 this Class Action Complaint.

7 79. Plaintiff and those similarly situated are further entitled to and do seek both a
8 declaration that the above-described trade practices are unfair, unlawful and/or fraudulent and
9 injunctive relief restraining Defendants from engaging in any of such deceptive, unfair and/or
10 unlawful trade practices in the future. Such misconduct by Defendants, unless and until enjoined
11 and restrained by order of this Court, will continue to cause injury in fact to the general public
12 and the loss of money and property in that the Defendants will continue to violate the laws of
13 California, unless specifically ordered to comply with the same. This expectation of future
14 violations will require current and future customers to repeatedly and continuously seek legal
15 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
16 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
17 remedy at law to ensure future compliance with the California Business and Professions Code
18 alleged to have been violated herein.

19 80. As a direct and proximate result of such actions, Plaintiff and the other members of
20 the Class have suffered and continue to suffer injury in fact and have lost money and/or property
21 as a result of such deceptive, unfair and/or unlawful trade practices and unfair competition in an
22 amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this
23 Court. Among other things, Plaintiff and the class lost (1) the portion of the amount they paid
24 for their PCs that is attributable to the operating system and (2) the additional amounts they paid
25 to obtain the System Disk, Recovery Disks, or retail versions of Windows operating systems.

26 81. As a direct and proximate result of such actions, Defendants have enjoyed, and
27 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
28 is in excess of the jurisdictional minimum of this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

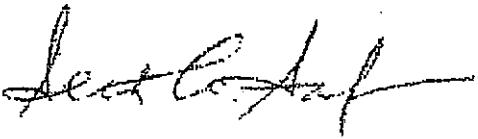
- A. On Causes of Action Numbers 1 and 4 against Defendants and in favor of Plaintiff and the other members of the Class:
 1. For restitution pursuant to, without limitation, the California Business & Professions Code §§ 17200, et seq. and 17500, et seq;
 2. For injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17200, et seq and 17500, et seq;
- B. On Cause of Action Number 2 against Defendants and in favor of Plaintiff and the other members of the Class:
 1. For restitution and injunctive relief pursuant to California Civil Code section 1780;
 2. [Reserved]; and
 3. [Reserved]
- C. On Cause of Action Number 3 against Defendants and in favor of Plaintiff and the other members of the Class:
 1. An award of compensatory damages, the amount of which is to be determined at trial; and
 2. An award of punitive damages, the amount of which is to be determined at trial;
- D. On all causes of action against Defendants and in favor of Plaintiff, class members and the general public:
 1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
 2. For costs of suit incurred; and
 3. For such further relief as this Court may deem just and proper.

1 **JURY TRIAL DEMANDED**
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3
4 Plaintiff hereby demands a trial by jury.
5

6 Dated: March 24, 2009
7

8 **GUTRIDE SAFIER LLP**
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12 Adam J. Gutride, Esq.
13 Seth A. Safier, Esq.
14 835 Douglass Street
15 San Francisco, California 94114
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17 Attorneys for Plaintiff
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EXHIBIT 2

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
2 Jeffery D. McFarland (Bar No. 157628)
3 jeffmcfarland@quinnemanuel.com
4 Stan Karas (Bar No. 222402)
5 stankaras@quinnemanuel.com
6 A.J. Bedel (Bar No. 243603)
7 ajbedel@quinnemanuel.com
8 865 South Figueroa Street, 10th Floor
9 Los Angeles, California 90017-2543
10 Telephone: (213) 443-3000
11 Facsimile: (213) 443-3100

12 Attorneys for Defendant ACER AMERICA
13 CORPORATION

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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

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18 COUNTY OF SANTA CLARA

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1 KEVIN EMBRY, an individual, on behalf of
2 himself, the general public and those similarly
3 situated,

4 Plaintiff,

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7 vs.
8 ACER AMERICA CORPORATION, a
9 California corporation; and Does 1 through 50,

10

11 Defendants.

12 CASE NO. 109-CV-138187

13 NOTICE OF REMOVAL OF ACTION TO
14 FEDERAL COURT

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES, AND THEIR
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that Defendant Acer America Corporation has removed
4 this action to the United States District Court for the Northern District of California. A
5 true and correct copy of the notice of removal filed in the federal court is appended hereto
6 as Exhibit A (exhibits to this Exhibit, which are the complaint and the instant notice of
7 removal are omitted for the Court's convenience, but will be provided upon request).
8 Pursuant to 28 U.S.C. § 1446(d), "the State court shall proceed no further unless and until
9 the case is remanded."

10

11 DATED: April 23, 2009

12 QUINN EMANUEL URQUHART OLIVER &
13 HEDGES, LLP

14

15 By Jeffery D. McFarland/AJF
16 Jeffery D. McFarland
17 Attorneys for Defendant ACER AMERICA
18 CORPORATION

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1 PROOF OF SERVICE

2 I am employed in the County of Los Angeles, State of California. I am over the age of
3 eighteen years and not a party to the within action; my business address is 865 South Figueroa
3 Street, 10th Floor, Los Angeles, California 90017-2543.

4 On April 23, 2009, I served true copies of the following document(s) described as
5 **NOTICE OF REMOVAL OF ACTION TO FEDERAL COURT** on the parties in this action
5 as follows:

6 Adam J. Gutride, Esq.
7 Seth A. Safier, Esq.
7 GUTRIDE SAFIER LLP
8 835 Douglass Street
8 San Francisco, California 94114
9 Telephone: (415) 336-6545
9 Facsimile: (415) 449-6469

10 **BY FEDEX:** I deposited such document(s) in a box or other facility regularly maintained by
11 FedEx, or delivered such document(s) to a courier or driver authorized by FedEx to receive
11 documents, in sealed envelope(s) or package(s) designated by FedEx with delivery fees paid or
12 provided for, addressed to the person(s) being served.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct.

14 Executed on April 23, 2009, at Los Angeles, California.

15 
16 _____
17 Sabrina Blank